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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Lisa Chandler Cordell

January 12, 2000

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RE: CS Docket No. 99-363
Comments of the American Cable Association

Dear Ms. Salas:

On behalf of the American Cable Association ("Association"), we enclose ten (10) copies of the Association's Comments in the above-referenced docket. We request that each Commissioner receive a personal copy of these materials.

We also include a "FILE COPY." We ask that you date-stamp and return it to the courier.

Please call with any questions.

Very truly yours,



Lisa Chandler Cordell

Enclosures

cc: American Cable Association
cc: Tom Power, Senior Legal Advisor to Chairman Kennard
Helgi Walker, Senior Legal Advisor to Commissioner Furchtgott-Roth
Rick Chessen, Senior Legal Advisor to Commissioner Tristani
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of:

**Implementation of the Satellite
Home Viewer Improvement
Act of 1999**

Retransmission Consent Issues

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CS Docket No. 99-363

To: The Commission

**COMMENTS OF THE
AMERICAN CABLE ASSOCIATION**

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January 12, 2000

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SUMMARY

This rulemaking provides the Commission with the opportunity to not only provide a workable set of rules to ensure fair retransmission consent agreements for DBS providers, but also to help protect the ability of all multichannel video programming providers ("MVPDs") to obtain reasonable retransmission consent agreements. By imposing modest restrictions on retransmission consent agreements that result in an industry-neutral, technology-neutral retransmission consent regulatory framework, the Commission will make significant progress towards fostering long-term, meaningful competition. In a fair competitive environment, smaller, independent cable businesses can also continue its aggressive build-out of high-speed broadband infrastructure throughout smaller towns and rural America.

The telecommunications marketplace has changed since the Commission chose to rely on marketplace regulation of retransmission consent agreements in 1993. Media giants have emerged, melding content providers with distributors. Many of smaller cable's competitors have significant market power that smaller cable lacks because of its smaller customer bases. Yet, as often the principal provider of local broadcast signals to smaller, insular communities and rural Americans, smaller cable plays a critical role in the MVPD market. Further, smaller cable needs access to local broadcast programming on reasonable rates, terms and conditions to remain competitive with the media giants that saturate the market.

Widespread broadcaster practices conditioning analog retransmission consent on digital carriage requirements, purchase of various satellite programming requirements and

cash payment demands, require Commission action. Smaller cable often cannot agree to the same terms and conditions of consent that larger MVPDs can afford, typically because of their smaller customer bases. In these comments, the Association sets forth a set of minimal restrictions that would apply to broadcaster dealings with all smaller MVPDs.

Modest restrictions, as suggested by the American Cable Association, will ensure smaller cable's continued access to local broadcast stations. Only then can the Commission level the playing field and secure long-term, meaningful competition in the MVPD market.

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CS Docket No. 99-363

To: The Commission

**COMMENTS OF THE
AMERICAN CABLE ASSOCIATION**

I. INTRODUCTION

The American Cable Association ("Association") files these Comments to address important issues raised by the Commission's Notice of Proposed Rule Making in this docket. By authorizing DBS local service in the Satellite Home Viewer Improvement Act of 1999,¹ Congress sought to "place satellite carriers on an equal footing with local cable operators when it comes to the availability of broadcast programming, and thus give consumers more and better choices in selecting a multichannel video program distributor."² Notwithstanding Commission enthusiasm for DBS local service, the Association cautions

¹ See Act of Nov. 29, 1999, Pub. L. No. 106-113, 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999) ("1999 SHVIA").

² See *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999*, Notice of Proposed Rule Making in CS Docket No. 99-363, FCC 99-406 (released December 22, 1999), at ¶ 1 ("NPRM").

against developing a lop-sided regulatory framework that elevates DBS at the expense of smaller, independent cable businesses and their customers. Instead, the Commission must develop a technology-neutral, industry-neutral retransmission consent regulatory scheme – a framework that Congress mandates must be “equal.”

The Association files these Comments on behalf of its approximately 300 member smaller, independent cable businesses and their smaller cable systems that serve more than 3.4 million customers nationwide. The majority of the Association's members have fewer than 1,000 total customers. Then known as the Small Cable Business Association, smaller, independent cable businesses formed the Association in 1993 to represent the collective interests of its members and to speak with a unified voice regarding issues affecting their businesses. The Association regularly represents its members' interests in Commission proceedings to inform the Commission of characteristics and concerns of smaller and independently owned cable businesses and to ensure that Commission decisions do not unfairly and adversely impact the Association's members' businesses.

II. BACKGROUND

This rulemaking comes on the heels of Congress' aggressive efforts to further DBS competition to cable and thus improve consumer choice in multichannel video programming distributors (“MVPDs”). Intense pressure from DBS carriers led Congress to authorize DBS local service.³ While promoting competition in the MVPD market remains

³ The 1999 SHVIA largely responds to issues raised by several suits involving DBS carriers' illegal actions relating to retransmission of broadcast signals. See, e.g., *CBS Broadcasting Inc. v. PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342; 1998 U.S. Dist. LEXIS 20442 (S.D. Fla. 1998), *judgment entered in* 1998 U.S. Dist. LEXIS 20488 (S.D.

an important objective, it remains equally important that the Commission promote meaningful competition among all MVPDs.

This proceeding requires more than Commission implementation of rules that will govern the broadcaster-DBS retransmission consent process. To promote meaningful and long-term competition, the Commission must revisit its existing retransmission consent regulations and craft a regulatory framework that affords cable and DBS the same protections when negotiating retransmission consent.

III. ONLY A COMPREHENSIVE AND UNIFORM REGULATORY POLICY WILL PROMOTE TRUE MVPD COMPETITION AND RURAL BROADBAND DEPLOYMENT.

A. True Competition Mandates That Smaller Cable Have Access to Local Broadcast Signals.

Smaller cable serves as a significant source of information for smaller, insular communities and rural America. Smaller cable requires carriage of local broadcast signals to remain competitive with DBS offerings that often can offer a greater variety of non-local channels. Without carriage of local signals, smaller, independent cable becomes significantly less competitive.

Widespread broadcaster abuses in the retransmission consent negotiation process have made it increasingly difficult, if not impossible, for smaller cable to provide its core service -- local broadcast signals. In addition to denying smaller cable's customers of invaluable local information, smaller cable's inability to sustain its core service will

Fla.). As a result of those court decisions, millions of DBS subscribers faced losing satellite-delivered broadcast signals.

undermine its efforts to launch new services, including broadband services, to these communities. To ensure meaningful MVPD competition and smaller cable's continued aggressive rural broadband deployment,⁴ the Commission must embrace a uniform regulatory policy.

B. Disparate Retransmission Consent Treatment Will Impede Smaller Cable's Ability to Deploy Broadband Services.

Any threat to the continued availability of local broadcast signals will also impede smaller cable's ability to deploy advanced, broadband services to rural America. Smaller, independent cable entrepreneurs, many spurred by the deregulation provided in the 1984 Cable Act, built cable systems in places where no one else would -- not even the local telephone provider. These small businesses and individuals accepted the risk of building in high-cost and lower-income areas as well as the lower rates of return that service to rural America often dictates. Most built successful businesses serving rural America. Most of these smaller cable businesses have continued to invest in their communities over the years. Today, many provide or are about to launch new services, often including high-speed digital, data and Internet services in rural America. The marketplace for these smaller cable businesses works. Even in the face of vigorous competition in their core businesses from DBS, smaller cable continues to invest in rural America.

Smaller cable businesses have made, and continue to make, tremendous strides in bringing advanced services to rural America. Through true entrepreneurial spirit, these

⁴ See generally *In the Matter of Local Competition and Broadband Reporting* Comments of the American Cable Association in CC Docket No. 99-301 (December 3, 1999) at 4-5.

businesses have sought and found creative solutions to build the infrastructure needed to provide advanced services. The Association estimates that almost half of its member businesses have already deployed at least one type of high-speed broadband service in rural communities. Many more have plans underway to launch similar services.

Providing these high-cost infrastructure investments in smaller communities, however, remains a challenge. Without access to local broadcast signals, smaller cable stands to lose revenue that would otherwise sustain its efforts to bring broadband services to insular communities and rural America. Continued aggressive smaller cable rural broadband deployment, therefore, mandates universally applicable retransmission consent regulations.

C. Significant Marketplace Changes Warrant Revision of the Commission's Retransmission Consent Rules.

Further evidence of the need for uniform retransmission consent regulations rests with changes in the media marketplace. Massive consolidations among media companies and changes in station ownership and duopoly limits has concentrated market power in the hands of a few.

Huge media conglomerates have emerged that control most marquis cable services. For example, Time Warner/Turner, Disney/ABC, and Fox/News Corp. have amassed huge content portfolios that include many marquis services; so too will Viacom/CBS pending Commission approval of the transfer of its broadcast licenses.⁵ Three of these entities

⁵ The Association recently filed a Petition to Deny the CBS/Viacom application for transfer of control. *See In re Application of Shareholders of CBS Corporation and Viacom, Inc., for Consent to Transfer of Control of CBS Corporation and its Licensee Subsidiaries*

control substantial broadcast properties, and a combined CBS/Viacom entity will control more than all of the other networks combined.⁶ The just-announced blockbuster America Online/Time Warner merger will, no doubt have a similar, significant adverse impact on smaller cable.

Despite massive consolidation by content providers and broadcasters, thousands of smaller, independent cable systems provide service to rural and insular areas. Because of their small size, these businesses, however, remain without market power. Marketplace forces cannot sufficiently regulate retransmission consent negotiations where such imbalances exist.

Congressional recognition of the need for a framework within which broadcasters and DBS operators will negotiate retransmission consent further demonstrates that marketplace forces will not adequately ensure fair and equitable retransmission consent negotiations. As Senator Hollings commented in support of the Satellite Home Viewer Improvement Act of 1999:

Language also has been placed in the bill to improve the negotiating position of the satellite companies in their negotiations with broadcasters to obtain programming. Hopefully, this provision will help satellite providers to obtain programming from broadcasters on fair and reasonable terms,

from the Shareholders of CBS Corporation to Viacom Inc., Petition to Deny of the American Cable Association, File Nos. BTCCT-19991116AAX-AAZ, BTCCT-19991116ABA-ABQ (filed January 3, 2000).

⁶ See *The CBS-Viacom Merger, World of the Media Giants*, TIME MAGAZINE, September 20, 1999 (CBS/Viacom would control 41 broadcast television stations, while ABC has 10, Fox 15 and NBC 13).

and ultimately, provide consumers with service at a competitive price.⁷

If Congress had concern that broadcasters would make unreasonable demands of DBS providers that serve more than 11 million customers combined,⁸ then it would be consistent to ensure there are similar, sufficient safeguards to protect individual smaller cable businesses, the vast majority of which serve fewer than 1,000 total customers. Today, no such safeguards exist. Consequently, the Commission must establish those safeguards as part of this rulemaking.

IV. MODEST RESTRICTIONS THAT UNIVERSALLY APPLY WILL ENSURE CONTINUED, WIDESPREAD AVAILABILITY OF LOCAL BROADCAST STATIONS.

A. Unrestricted Retransmission Consent Poses Significant Risks to Smaller, Independent Cable.

To date, retransmission consent agreements have remained largely unrestricted.⁹

Smaller cable, however, has witnessed widespread abuse by broadcasters that seek to

⁷ See 145 Cong. Rec. S15014-S15015 (Statement of Sen. Hollings).

⁸ See EchoStar Rocks in Millennium with Free New Year's Eve Concert for Dish Network Customers (Press Release, Dec. 30, 1999), found at <<http://www.echostar.com>> (last visited Jan. 11, 2000) (stating that the Dish Network serves more than 3.25 million subscribers); see also DIRECTV Ends Record-Breaking Year With More than 8 Million Customers (Press Release, Jan. 6, 2000) found at <<http://www.directv.com>> (last visited Jan. 11, 1999) (announcement that DIRECTV now has more than 8 million subscribers).

⁹ See, e.g., 47 C.F.R. § 76.64 (requiring written retransmission consent for carriage of certain commercial television broadcast stations); 47 C.F.R. § 76.64(m) (prohibiting exclusive retransmission consent agreements); 47 C.F.R. § 76.60(c) (permitting cable operators to accept payment for retransmission consent); 47 C.F.R. § 76.922(f)(iv) (categorizing retransmission consent fees incurred for the carriage of broadcast signals as an external cost for purposes of permissive pass-through costs).

extract unreasonable concessions in return for retransmission consent. This issue has intensified with the most recent election cycle, during which broadcasters began to hold analog retransmission consent hostage for digital carriage, in addition to requiring carriage of additional satellite-delivered product of their parent companies. While the impact of these demands may remain inconsequential for larger cable systems, smaller cable systems, without digital capabilities,¹⁰ face losing an integral component of their channel line-up – local broadcasters' analog signals.

1. Broadcasters demand digital carriage.

Several nationwide retransmission consent master agreements involving large cable providers highlight the unreasonable concessions broadcasters have begun to demand in exchange for retransmission consent. In Time Warner's deal with CBS and AT&T's deals with Fox and NBC, the broadcasters have required carriage of their digital broadcast signals.¹¹ In addition, "[o]ut of the 187 MediaOne retransmission agreements in force, 33

¹⁰ The high per-customer cost of headend equipment makes the necessary upgrades unrealistic for many smaller cable systems. See *In the Matter of Carriage of the Transmission of Digital Television Broadcast Stations*, Comments of the Small Cable Business Association in CS Docket No. 98-120 (October 13, 1999) at 6-7 ("*Digital Must-Carry Comments*").

¹¹ See *CBS and Time Warner reach DTV carriage deal*, COMMUNICATIONS DAILY (Dec. 9, 1998) at Today's News; Price Colman, *AT&T to carry Fox DTV*, BROADCASTING & CABLE, No. 37, Vol. 129 (Sept. 6, 1999) at p.10; Jim McConville, *NBC puts all it's got on AT&T: Deal locked in for eight years*, ELECTRONIC MEDIA (June 14, 1999) at News, p.1; Linda Moss, *AT&T-NBC Deal: A Digital Template; sign long-term digital broadcast carriage agreement*, MULTICHANNEL NEWS, NO. 25, VOL. 20 (June 14, 1999) at p. 6.

percent have digital carriage provisions, including 8 out of the 9 broadcasters in MediaOne's service areas that have commenced digital service."¹²

These agreements are designed to strong-arm the availability of digital broadcast signals at a time when broadcasters have no endorsement from the federal government to require it. Essentially, tying digital broadcast carriage to analog retransmission consent is the broadcasting industry's jerry-rigged way to achieve digital must-carry. The CBS/Time Warner, Fox/AT&T, and NBC/AT&T agreements serve as templates for retransmission consent agreements between these broadcast networks' affiliates and large MSOs.¹³ One estimate suggests that more than 44% of all cable customers will likely have digital broadcast signals available to them as a result of these agreements and their likely adoption by broadcast network affiliates.¹⁴ Broadcast networks have not been reticent in attempting to impose similar digital broadcast carriage requirements on smaller cable.

Broadcast network affiliates' adoption of these master agreements significantly impacts smaller cable systems and their customers in ways that are not felt by larger, better-financed cable MSOs. To the extent most-favored-nation provisions in larger MSOs' retransmission consent agreements ensure parity among cable systems, broadcasters

¹² See *Ex Parte* submission of the National Cable Television Association in CS Docket No. 98-120, filed November 1, 1999 ("*Priming the Pump: The Role of Retransmission Consent in the Transition to Digital Television*, prepared by Stuart N. Brotman, Stuart N. Brotman Communications, October 1999, on behalf of the National Cable Television Association)("NCTA Position Paper").

¹³ See *NCTA Position Paper* at 6-7.

¹⁴ See *id.* at 6.

demand identical terms from smaller cable systems.¹⁵ The potential loss of important local analog broadcast signals, however, is even greater for smaller, rural communities because smaller cable does not have the technical or financial ability to provide digital signals in return for analog retransmission consent.

2. Broadcasters tie analog retransmission consent to carriage of additional satellite programming.

Many broadcasters, especially those owned or affiliated with broadcast networks, continue to condition analog retransmission consent on carriage of new satellite programming products. Although not new, the increased concentration of media programmers with broadcast networks exacerbates this situation.¹⁶

Tying demands by mega-programmers offering marquis services to carriage of new products only encourages further erosion of programming diversity. Mega-programmers continue to leverage their market share and negotiating imbalance by demanding increasing amounts of channel capacity to the exclusion of other programmers. This continually increasing concentration undermines federal law and policy.¹⁷

¹⁵ See *infra* Part IV.A.3.

¹⁶ For example, Disney has become hyper-aggressive in its attempts to launch "SoapNet," its 24-hour soap opera channel. Association members in the Chicago DMA, for example, have faced denial of analog consent because they operate small, channel-locked systems that cannot currently add channel capacity. These members have confronted the harsh reality of Disney's "take-it-or-leave-it" attitude. The concerns of the Association and several directly affected members was more fully described in *Disney's Retrans Clout Comes to SoapNet's Aid*, MULTICHANNEL NEWS, Vol. 20, No. 45, November 1, 1999 at 1, 65.

¹⁷ See, e.g., 47 U.S.C. § 521(4); see also *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 192 (1997) ("[I]t has long been a basic tenet of national communications

3. Most-favored nation provisions seal fate of smaller cable businesses.

a. Restrictions on broadcasters.

Extensive use of most-favored-nation provisions in retransmission consent agreements requires most broadcasters to impose the same terms and conditions on smaller cable businesses as they do on the largest providers. To ensure that retransmission agreements with other cable system operators do not result in more favorable provisions, the Association's members have witnessed widespread, almost universal, inclusion of most-favored-nation provisions in national and other retransmission consent master agreements. These provisions require broadcasters to modify existing agreements to include any more favorable term offered to another cable system. Broadcasters, unwilling to compromise their existing arrangements with the largest cable service providers, have historically required that all cable businesses accept, at minimum, the same terms as those agreed to by the largest provider covered by the agreement.

b. Restrictions on smaller cable businesses.

Broadcasters often also require smaller cable businesses to provide assurances that they will not agree to more costly terms with another broadcaster. Where this most-favored-nation provision under a contract with Broadcaster "A" exists, smaller cable businesses that agree to pay, for example, retransmission consent fees to Broadcaster "B"

policy that the 'widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.' (internal citations omitted) . . . 'Increasing the number of outlets for community self-expression' represents a 'long-established regulatory goal in the field of television broadcasting.'" (internal citations omitted)).

must also provide the same level of payment to Broadcaster "A." Such provisions prohibit smaller cable from crafting unique solutions to individual situations faced by each broadcaster, even within the same market.

4. Carriage of any digital product could trigger digital carriage obligations.

The Association has observed several proposed contracts in use across the country that demand carriage of broadcast digital products as soon as the cable system begins delivering any digital product. This agreement presumes that delivery of any digital product, e.g., Headend in the Sky ("HITS"), lowers the high cost of carrying off-air digital signals. It does not.¹⁸ This raises particular concern because smaller cable systems may offer a digital product, like HITS, that does not negate the unaffordable high per-customer cost of processing digital off-air signals. Further, other even smaller cable systems may use "HITS2Home," a digital product that inserts satellite-delivered digital signals at the customer's home, thereby avoiding all headend and facilities-related costs. This delivery of digital product, however, does not automatically lower the high per-customer cost of carrying broadcaster-mandated digital signals. A broadcaster that insists upon requiring digital carriage at such time that a system offers any digital product would therefore obligate smaller cable systems to upgrade their facilities, notwithstanding operators' business judgments that such upgrades currently remain economically infeasible.

¹⁸ See *Digital Must-Carry Comments* at 6-7 (discussing high costs of upgrading small systems to accommodate off-air, digital signals); see *In the Matter of Carriage of the Transmission of Digital Television Broadcast Stations*, Reply Comments of the Small Cable Business Association in CS Docket No. 98-120 (December 21, 1998) at 5.

Faced with unaffordable per-customer costs that broadcasters are attempting to impose on smaller systems, smaller cable businesses have little choice but to forego consent. This leaves smaller cable businesses with only two choices: (1) allow the broadcaster to withdraw its analog signal; or (2) agree to carriage obligations that they know they cannot meet and breach the contract, only to defer cessation of analog carriage and raising the economic stakes associated with litigation and damage awards. Smaller cable businesses and their customers therefore have no meaningful alternative.

5. Broadcasters offer smaller cable retransmission consent on a "take-it-or-leave-it" basis.

Broadcasters have continued to offer smaller cable systems retransmission consent for their analog signals on a "take-it-or-leave-it" basis. As the Association has previously explained,

Small cable lacks bargaining power because it lacks a sufficient customer base, relative to the broadcaster's total market, to withhold from the broadcaster. Broadcasters have no downside if a small cable system does not carry their [sic] signal[s] [sic]. The loss of viewers is simply insignificant and does not impact the broadcaster's revenue.¹⁹

Because the loss of viewers resulting from removal of broadcasters' signals from smaller cable systems will not significantly impact broadcasters' ratings or revenue, broadcasters remain unconcerned whether smaller cable systems carry their signals. If smaller cable systems are unwilling to accede to broadcasters' carriage demands, broadcasters can simply walk away from negotiations and deny retransmission consent.

¹⁹ See *Digital Must-Carry Comments* at 24.

Left unchecked, cable customers will fall into two groups — those that receive duplicate broadcast signals and those that receive no broadcast signals. If the above-described deals provide any indication, broadcasters will likely succeed in securing digital carriage for the majority of cable customers. Required to carry analog and digital signals, however, cable customers of the country's major cable providers will receive duplicate broadcast programming. Conversely, customers of smaller cable systems, particularly of the smallest systems that often offer the only means for rural Americans to receive broadcast signals, may not receive any broadcast signals. For these customers, broadcasters' ability to demand digital carriage or withhold analog retransmission consent will leave them without any access to broadcast signals. Of course, either result contradicts federal policy.

B. Despite Prior Restrictions, Exclusivity Issues Continue To Abound.

1. Unregulated retransmission consent agreements constitute *de facto* exclusive agreements.

While leaving retransmission consent negotiations largely unregulated, the Commission has always recognized the importance of prohibiting exclusive retransmission consent agreements.²⁰ In some instances, unregulated retransmission consent

²⁰ See *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order in MM Docket Nos. 92-259, 90-4, 92-295, and RM-8016, 8 FCC Rcd 2965 (1993) at ¶ 179 ("Broadcast Signal Carriage Order") ("The Commission recognizes that exclusivity can be an efficient form of distribution, but, in view of the concerns that led Congress to regulate program access and cable signal carriage agreements, we believe that it is appropriate to extend the same nonexclusivity safeguards to non-cable multichannel distributors with respect to television broadcast signals.").

agreements will constitute *de facto* exclusive agreements, circumventing federal law.²¹ This can easily occur where the Commission allows broadcasters to impose unaffordable demands on smaller cable businesses – demands that larger businesses operating larger systems can afford. Where the larger and smaller businesses provide service to the same franchise area (either competing or merely side-by-side) one will have consent, the other will not. Because the demands placed on the smaller system constitute an economic impossibility, the broadcaster has granted *de facto* exclusive retransmission consent to the larger provider. While the Commission appears to have sought to preclude this result, its rules fail to specifically address this predicament. As the Association explains below, the Commission should expand its prohibition to explicitly forbid *de facto* exclusive retransmission consent agreements.

2. The Commission Should Not Sunset its Exclusivity Restrictions.

The Commission must not sunset the exclusivity restriction as of January 1, 2006.²² As the Association explains above, the existing restriction already fails to adequately protect against abuses by not directly prohibiting *de facto* exclusive retransmission consent agreements.

The prohibition against exclusive retransmission consent agreements serves an important purpose — to “forbid a television station from agreeing with one multichannel

²¹ See 47 C.F.R. § 76.64(m).

²² See NPRM at ¶ 24. (The Commission suggests that “the Commission’s rules prohibiting exclusive retransmission consent agreements for cable operators would be deemed abrogated as of January 1, 2006.)

distributor to be carried by it and to deny carriage rights to other multichannel distributors."²³ Preventing broadcasters from entering exclusive agreements becomes no less important on January 1, 2006, or any other date. The Commission therefore must not sunset its prohibition against exclusive retransmission consent agreements.

C. The Commission Must Explicitly Articulate Its Definition of Good Faith Negotiation to Ensure Compliance.

1. The Commission should adopt a two-part good faith test with objective and subjective standards.

The Commission must carefully articulate its expectations regarding good faith negotiations and extend those obligations to all retransmission consent negotiations, including cable. This element of the retransmission consent process has particular importance due to the imbalance of market power and widespread abuses that have prevailed in past retransmission consent election cycles. By requiring broadcasters to act in a certain fashion, the Commission will provide aggrieved MVPDs a cause of action where the broadcaster fails to exemplify such behavior.

As suggested, the Commission should adopt an objective and subjective test for determining "good faith."²⁴ To give real meaning to "good faith negotiations," the Commission should outline its expectations as specifically as possible; some situations, however, may not constitute a specific violation but, when viewed in totality, still amount to bad faith.

²³ See *Broadcast Signal Carriage Order* at ¶ 179.

²⁴ See NPRM at ¶¶ 16-18.

Drawing from its members' experiences, the rules imposed on incumbent local exchange carriers,²⁵ and the rule changes proposed below, the Association suggests that in each instance described below, the broadcaster's behavior would amount to "bad faith":

- Demanding a nondisclosure agreement that would preclude the MVPD from providing information requested by the Commission or other government body.
- Demanding that the MVPD attest that an agreement complies with all federal, state and local laws.
- Refusing to include a provision in an agreement permitting changes in the event of future changes in law.
- Intentionally misleading or coercing an MVPD into entering an agreement it would not have otherwise entered.
- Intentionally delaying or blocking negotiations or resolution of disputes.
- Refusing to appoint a representative with binding authority.
- Refusing to make available information needed to reach an agreement or challenge an alleged violation.

Whenever a broadcaster engages in any of these specified behaviors, it would amount to a *per se* violation of the broadcaster's obligation to engage in "good faith negotiations." Even if the broadcaster does not breach these specified *per se* violations, its behavior can still amount to bad faith where the totality of the circumstances suggests its intention not to enter a retransmission consent agreement on non-discriminatory and equitable terms.

²⁵ See NPRM at note 38.

2. The Commission must specify additional *per se* violations relative to broadcasters' dealings with smaller cable.

The Association advocates some additional *per se* violations that remain specific to smaller cable and other smaller MVPDs. Each of the following instances would constitute bad faith where it involves a broadcaster's dealings with smaller cable or other smaller MVPDs:

- Insisting that an MVPD carry either digital signals or other satellite cable programming in exchange for retransmission consent in contravention of the Commission's revised regulations.
- Where a broadcasters' demands would result in a *de facto* exclusive retransmission consent agreement, refusing to offer the aggrieved smaller MVPD the same terms and conditions.
- Refusing to deal with smaller MVPDs or their representatives, e.g., buying cooperatives.
- Failing to offer smaller MVPDs terms and conditions, including price terms, at least as favorable as those offered to competitors.

The Association appreciates that the Satellite Home Viewer Improvement Act of 1999 "expressly permits broadcasters to negotiate retransmission consent agreements with different terms and conditions based on competitive marketplace considerations."²⁶ Smaller cable's and other smaller MVPDs' smaller customer bases, however, do not constitute "competitive marketplace considerations" justifying different terms and conditions.

The limited legislative history to the 1999 SHVIA supports this point. As Senator Kohl commented,

²⁶ See NPRM at note 40; see also 47 U.S.C. § 325(b)(3)(C)(ii).

... there may be some disagreement as to what exactly this new provision means. At the very least, "competitive marketplace considerations" may simply be interpreted as the normal, everyday jostling that takes place in the business world. At the very most, a "competitive marketplace" would tolerate differences based on **legitimate cost justifications, but not anti-competitive practices** such as illegal tying and bundling.²⁷

For each of the *per se* violations outlined above, no legitimate cost justification underlies such behavior. Instead, such behavior is nothing more than anti-competitive.

Public policy considerations further justify more stringent good faith obligations specific to broadcasters' negotiations with smaller cable. Often the primary provider of local broadcast signals to smaller, insular communities and rural America, smaller cable plays a critical role. The Commission therefore must take limited actions to preserve smaller cable's role in disseminating important local information to its customers.

D. Minor Rule Changes Will Bring Balance to the Retransmission Consent Negotiation Process.

Imposition of modest parameters on all retransmission consent agreement terms will help safeguard the continued vitality of smaller cable and its customers' access to local broadcast signals. To accomplish this, the Association recommends the following Commission actions:²⁸

- ◆ **New 47 C.F.R. § 76.64(o).** Amend 47 C.F.R. § 76.64 (Retransmission consent) to add a new subsection preventing broadcasters from requiring

²⁷ See NPRM at note 42 (citing 145 Cong. Rec. S15017 (daily ed. Nov. 19, 1999) (statement of Sen. Kohl)) (emphasis added).

²⁸ The Commission can easily adapt these restrictions, to the extent necessary, for application to DBS-broadcast retransmission consent negotiations.

digital carriage in exchange for analog retransmission consent, except where the cable system has upgraded to 750 MHz and carries other digital products.

- ◆ **New 47 C.F.R. § 76.60(d).** Amend 47 C.F.R. § 76.60 (Compensation for carriage) to add a new subsection preventing broadcasters from charging cable operators unreasonable fees for analog retransmission consent. Any fee associated with analog retransmission consent must rationally relate to the benefit the cable operator receives vis-a-vis carriage but preclude higher charges for smaller cable systems.
- ◆ **Revised 47 C.F.R. § 76.64(m).** Modify 47 C.F.R. § 76.64(m) to preclude *de facto* exclusive retransmission consent agreements. The revised provision should permit aggrieved cable operators to petition the Commission to require the broadcaster involved to offer the operator retransmission consent on the same terms.
- ◆ **New 47 C.F.R. § 76.64(p).** Amend 47 C.F.R. § 76.64 to add a new subsection precluding broadcasters from tying retransmission consent to the carriage of satellite-delivered broadcast signals.
- ◆ **Dispute resolution procedure.** Amend Section 76.61 (Disputes concerning carriage) to add a new subsection establishing a dispute resolution procedure that allows aggrieved cable operators to file a complaint with the Commission for violations of new Section 76.60(d), new Section 76.64(o), new Section 76.64(p) or modified 76.64(m). To minimize customer disruptions and preserve precious Commission resources, this provision should include the following:
 - ◆ To encourage business-to-business solutions, aggrieved cable operators may only file complaints after (1) December 1 of the year in which the broadcaster made its retransmission consent election;²⁹ or (2) providing the broadcaster notice of its intention to file a complaint, by overnight delivery or certified mail, return receipt requested, and

²⁹ Because cable operators must provide notice of channel deletions at least 30 days prior to implementing those changes, see 47 C.F.R. § 76.58(a), December 1 marks the latest possible date to provide notice before the beginning of the next cycle.

the broadcaster fails, within five days, to provide a written response of its intention to comply.³⁰

- ◆ Cable operators that previously carried the channel in dispute may continue to carry that channel pending final Commission action.
- ◆ The complaint procedure shall consist of paper pleadings only. The pleading cycle will consist of (1) filing of a complaint, with service to the broadcaster by courier or overnight delivery; (2) Commission notice of receipt of the complaint; such complaint shall appear on public notice not more than five days after the date the Commission received it; (3) the broadcaster may file an opposition within ten days of the public notice date; and (4) the cable operator may file its response within five days of the opposition deadline. The Commission must issue its decision within 30 days of the opposition deadline.

These modest restrictions will ensure the continued vitality of smaller cable businesses and the continued widespread availability of local broadcast signals to rural and insular areas.

E. The Commission Must Permit Any Aggrieved Party to Enforce the Retransmission Consent Rules.

Because competitors often serve as the best watchdog against noncompliance, the Commission must give all MVPDs standing to challenge alleged retransmission consent violations. DBS' national footprint means it universally competes with non-DBS MVPDs. These competitors therefore have an interest in ensuring compliance with certain DBS retransmission consent rules. Conversely, DBS carriers have an interest in ensuring compliance with certain cable retransmission consent rules. DBS carriers therefore should also have the ability to enforce the cable retransmission consent rules. By permitting any

³⁰ Should the cable operator elect to file its complaint before December 1, it must include a copy of its notice, including proof of delivery, with its complaint.

aggrieved MVPD to seek compliance with the Commission's retransmission consent rules, the Commission will level the playing field and ensure true competition.

V. CONCLUSION

The Association and its members generally support competition in the MVPD market but strongly believe that meaningful competition requires a level playing field, which will only come about with uniform regulatory measures. Retransmission consent issues remain critically important for smaller cable businesses that heavily rely on local broadcast signals to sustain their businesses and generate the revenue needed to deploy broadband services. Modest restrictions will help bring balance to the current retransmission consent negotiation process that has become subject to widespread broadcaster abuses.

The Association therefore suggests that the Commission broaden this rulemaking, which Congress intended to help fast-track DBS competition to cable, to include revisions to the cable retransmission consent rules. These changes will foster fair, meaningful competition between cable and DBS.

Respectfully submitted,

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